Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

IBRAHIM ALSAEED,

Petitioner,

v.

MICHELLE THORPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the First District of Texas correctly applied the federal doctrine of qualified immunity in a defamation case when Petitioner had exercised the right to petition guaranteed by the First Amendment.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals for the First District of Texas were Michelle Thorpe, Ibrahim Alsaeed and the Houston Community College System.

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STATEMENT OF JURISDICTION

On August 10, 2000, the Texas Supreme Court denied Petitioner Alsaeed's petition for review, which denied discretionary review of the Texas Court of Appeals' opinion (Appendix at 28a). The jurisdiction of this Court is involved under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Title VII of the 1964 Civil Rights Act 42 U.S.C. § 2000e-5, *et seq.*

(The relevant portions are reproduced in the Appendix at 30a.)

STATEMENT OF THE CASE

This case presents the question of an important issue of federal law, whether federal constitutional law requires that a plaintiff has the burden to produce summary judgment evidence of actual malice in an action for defamation filed in response to a defendant's exercise of his First Amendment rights. This federal question affects the proper allocation of the burden of proof in a summary judgment proceeding under a *New York Times v. Sullivan*, 376 U.S. 254 (1964) analysis.

The Texas Court of Appeals, in the decision below, found that Petitioner had the burden to prove the *absence* of malice and reversed and remanded the district court's granting of summary judgment for Petitioner. By its opinion, the appeals court rejected Petitioner's contention that the Respondent had the burden to produce summary judgment evidence of malice.

(i) Proceedings in the Courts Below

Respondent Michelle Thorpe filed suit in the 190th Judicial District Court of Harris County, Texas against Petitioner Alsaeed for defamation and tortious interference with her contractual relationship with the Defendant Houston Community College System. The trial court dismissed the Respondent's case by entering two separate orders granting the motion for summary judgment filed by each Defendant. In Petitioner's motion for summary judgment, he raised the issue of qualified immunity based on his exercise of the First Amendment right to petition for redress of grievances.

Subsequently, the Texas Court of Appeals for the First District of Texas reversed the District Court's ruling in favor of Respondent, holding that it was Petitioner's burden to prove an *absence* of malice in a summary judgment proceeding. By its opinion, the Court of Appeals rejected Petitioner's arguments that *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *McDonald v. Smith*, 472 U.S. 479 (1985) indicated the burden should be placed on the Respondent to produce summary judgment evidence of malice. The Texas Supreme Court denied Petitioner's petition for review after Petitioner had again raised the issue of qualified privilege pursuant to the right to petition under the First Amendment.

(ii) Facts

Petitioner was a long-time employee of the Houston Community College System ("HCCS"), a public educational institution and a political subdivision of the State of Texas. Respondent, who is still an employee of HCCS, filed this case against the Petitioner for alleged defamation and tortious interference with Respondent's contractual relationship with HCCS after the college administration decided that a full-time faculty position to which Respondent had been promoted was to be declared "open" and vacant. The college's action was due, in part, to Petitioner's protests that he had been discriminated against by HCCS administrators when Respondent was selected to fill the disputed position.

Both Petitioner and Respondent had applied for promotion to the same full-time, permanent faculty position. In March 1997, Petitioner was informed that he had not been selected for the disputed position and at the same meeting was informed that he was being non-renewed at the end of the spring semester.

Petitioner protested his non-selection in several ways. He wrote a series of letters to various college officials. Receiving no relief, he then attempted to file a grievance pursuant to college policy. Petitioner then filed a complaint with the HCCS Access and Equity Office[1] regarding his claims of illegal discrimination in his non-selection. Finally, Petitioner filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) alleging that his non-selection was illegal discrimination on the basis of race, religion, and sex.

---

1. The office responsible for internal investigation and handling of discrimination complaints by employees.

The college administration investigated Petitioner's claims of illegal discrimination and decided to reopen the disputed job position for reconsideration. In response to HCCS's decision to reopen, Respondent filed this case against both Petitioner and HCCS.

After extensive discovery, the state district court granted Petitioner's motion for summary judgment, which was based in part on the qualified immunity or privilege defense afforded to Petitioner due to his First Amendment activities in petitioning government officials. The Petitioner cited *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *McDonald v. Smith*, 472 U.S. 479 (1985).

Subsequently, the Texas First Court of Appeals reversed, holding that Petitioner had the burden to prove an *absence* of malice to establish qualified immunity as a matter of law. The Court of Appeals rejected Petitioner's contention that under federal constitutional law the Respondent had the burden to produce competent summary judgment evidence to overcome Petitioner's claim of qualified immunity.

Next, the Texas Supreme Court exercised its discretion and denied Petitioner's petition for review. The important issue of the allocation of the burden of proof under the federal doctrine of qualified immunity defense is squarely presented by this case.

The Texas Court of Appeals erroneously failed to place the burden on the Respondent to defeat Petitioner's claim of qualified immunity by producing summary judgment evidence of malice on the part of Petitioner. The Court of Appeals' decision has a chilling effect on all public employees who need to exercise their right to petition the government for redress of grievances.

Further, in this case Petitioner was speaking out on issues of public importance, *i.e.*, discrimination prohibited by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5, *et seq*. Finally, if the right to the qualified immunity defense for filing a charge with the EEOC is so illusory then important federal rights under both Title VII and the First Amendment will not be exercised by those who have suffered discrimination.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE TEXAS COURT OF APPEALS CORRECTLY APPLIED THE FEDERAL DOCTRINE OF QUALIFIED IMMUNITY IN A DEFAMATION CASE WHEN PETITIONER HAD EXERCISED THE RIGHT TO PETITION GUARANTEED BY THE FIRST AMENDMENT.

Among the important federal doctrines at issue is the proper allocation of burden of proof concerning qualified immunity where a public employee has raised important societal issues of illegal discrimination in his petition for redress of grievances and then has been sued for defamation.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court developed the doctrine of qualified immunity and announced an actual malice standard that must be proven by the plaintiff in a defamation suit to overcome the right to qualified immunity. *New York Times*, 376 U.S. 254, 279-280.

In *McDonald v. Smith*, 472 U.S. 479 (1985), this Court ruled that the right to petition clause of the First Amendment did not provide absolute immunity. Instead, the right to

petition provided qualified immunity with the requirement that the plaintiff overcome the qualified immunity test involving the proof of malice as defined by the *New York Times* standard. *McDonald*, 472 U.S. 479, 485.

This case does not involve a public figure such as *McDonald*, 472 U.S. 479. However, this case involves the issue of Petitioner's petitions regarding discrimination in violation of Title VII. Petitioner's employment dispute over the alleged illegal discrimination was not with the Respondent, but rather the college. However, the Respondent was the beneficiary of the illegal discrimination against the Petitioner. Thus, this case concerns the balance of the Respondent's rights as a non-public figure weighed against the important societal interest of the Petitioner's rights to petition regarding discrimination prohibited by Title VII.

Further, this case is not an issue of procedural law of the State of Texas as it relates to the burden of proof in summary judgment proceedings. Rather, it involves the important federal doctrine of substantive constitutional law regarding when a qualified immunity defense to a defamation applies and who has the burden of proof and persuasion in a summary judgment proceeding when the issue of the right to petition is the basis of the qualified immunity defense.

This Court must recognize that in this case it was a jurisdictional prerequisite under Title VII that:

(1) Petitioner file an EEOC charge; and

(2) that he obtain a right to sue letter.

Any attempt by Petitioner to file a Title VII suit without first filing a charge with the EEOC would have resulted in dismissal of his Title VII lawsuit. *Barnes v. Levitt*, 118 F.3d 404 (5th Cir. 1997).

Considering the important societal interests in curtailing illegal discrimination, this Court cannot give unlimited discretion to the state courts in allocating the competing burdens involved in the federal doctrine of qualified immunity. To do so would render the *New York Times* standard to a nullity and all public employees would suffer the possible consequences of defending their exercise of the right to petition against illegal discrimination in front of a state court jury without the benefit of a summary judgment determination of their qualified immunity rights under the First Amendment.

This Court has long recognized the necessity for federal guidance regarding qualified immunity in Section 1983 cases. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Similar policy considerations apply here. Public employees who choose to exercise their right to petition for redress of alleged discriminatory practices by an employer should not have to defend their actions unless the offended party can meet the burden of overcoming a qualified immunity defense in a summary judgment proceeding.

There are important federal rights at stake in this case. If this case goes to a jury trial without a proper determination of the Petitioner's qualified immunity rights in the summary judgment proceeding, the chilling effect on those who wish to complain to the government regarding illegal discrimination will render the right to petition meaningless.

Finally, this Court should note what this case concerns. This case arises from an employment dispute in which Petitioner and Respondent have strong disagreements regarding which of them should have received the disputed promotion. This is NOT a case in which Respondent has alleged that Petitioner was instrumental in convincing the college to illegally discriminate against her because she is in a protected class, or because she exercised her rights to free speech or even academic freedom. Simply, Respondent is angry at Petitioner for properly asserting his constitutional and statutory rights to challenge what he thought was illegal discrimination against him.

This Court should consider the ramifications if it allows this case to proceed to trial without a proper summary judgment determination regarding qualified immunity. The courts will be flooded with every petty disagreement and dispute between faculty members. The courts will be required to be a super school board intimately involved in the day-to-day disputes of faculty members.

Finally, faculty members who have real and legitimate concerns, such as Petitioner, will not dare to file a grievance or exercise their rights to free speech or academic freedom or even their rights pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq*. for fear of a fellow faculty member filing suit in court. Petitioner urges this Court not to open the floodgates by allowing qualified immunity to become a nullity.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the Texas First Court of Appeals.

Respectfully submitted,

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January 8, 2000

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS DATED MAY 11, 2000

**IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS**

NO. 01-99-00549-CV

MICHELLE THORPE,

Appellant

V.

IBRAHIM ALSAEED and HOUSTON COMMUNITY COLLEGE SYSTEM,

Appellees

**On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 97-57251**

OPINION

Appellant, Michelle Thorpe, is a history instructor at the southeast campus of the Houston Community College System ("the college").[1] Thorpe appeals summary judgments

1. References to staff or officials of "the college" mean the staff or officials of the southeast campus.

rendered for the college and for Ibrahim Alsaeed, who competed against Thorpe for a teaching position. We address whether summary judgment was properly rendered for the college on Thorpe's breach-of-contract claim, and for Alsaeed on Thorpe's claim that Alsaeed defamed her and tortiously interfered with her employment contract. We affirm in part and reverse and remand in part.

Facts and Procedural History

Thorpe began working as a full-time history instructor at the college in August 1995. She and Alsaeed had previously worked there as adjunct faculty members. In the 1995-96 academic year, Thorpe had a month-to-month contract. In June 1996, the college posted an opening for a full-time history faculty position, to replace a permanent faculty instructor who had resigned. The college withdrew the posting two months later due to lack of funding. Thorpe was hired as a full-time history instructor in August 1996, but still had only a month-to-month contract for the 1996-97 year. She applied again for the full-time position in the fall, when the college reposted it. Alsaeed also applied for the position.

On December 1, 1996, just before the posting for the position closed, Alsaeed sent a lengthy certified letter to the chancellor of the college. In addition to requesting the chancellor's attention to his pending application, Alsaeed inquired extensively into his four earlier unsuccessful attempts to obtain a full-time position, despite his Ph.D. in history and experience as an adjunct faculty member since 1984. Alsaeed's letter raised three "concerns" about the

hiring process: (1) whether ethnic bias was the cause of his lack of success in the past; (2) whether conflicts between the college instructors, who were also graduate students at the University of Houston, and their UH professors played any part in his lack of success in the past; and (3) whether "personality and knowing the candidate" were factors in hiring. Alsaeed suggested that, if the latter were true, he should be hired, as well as for his professional qualifications, which he documented by an attached resume.

A screening process narrowed a field of 18 applicants to 10, and then to three finalists, which included Thorpe and Alsaeed. At some point in the process, Thorpe and another applicant were allowed to submit additional materials to the screening committee, after which Thorpe received a higher ranking. Thorpe was ultimately selected and approved for history position 136011.

On March 5, 1997, Thorpe signed an employment agreement formalizing a term of hire from January 1, 1997 to May 18, 1997. The contract specified it would expire on May 18, 1997. Renewal or continued employment was "not automatic but subject to an affirmative action" by the college, including "an appropriate budget appropriation." The contract further provided that the chancellor or the college could reassign or change Thorpe's duties, and that employment was subject to the college's policies and procedures, unless these conflicted with the agreement. Provisions in the policy and procedures manual in turn specified that new, full-time employees had only probationary employment status for a full year, and were subject to dismissal "at any time during the probationary period for any reason and without the right to appeal."

Appendix A

On March 21, 1997, Dr. James Patterson, the acting dean of instruction at the college, met with Alsaeed to tell him Thorpe got the job. Alsaeed was discharged as a full-time instructor three weeks later, whereupon he began investigating what he described as "the real reason" why Thorpe was hired instead of him.

On May 14, 1997, Alsaeed sent a six-page, single-spaced, certified letter to the human resources coordinator for college. In this letter, Alsaaed stated Thorpe had received "preferential treatment" from Patterson as well as from Karen Saenz, who served as the acting chair of the department of social sciences and chaired the hiring committee. Alsaeed's letter referred to "thoroughly reliable information" that Patterson and Saenz were "committed to hire" Thorpe "long before" the hiring process began. Alsaeed outlined his claim in 28 numbered paragraphs. The first paragraph accused Thorpe of stating that the dean of instruction had "assured her," even before the hiring committee began, that the history position was hers. In concluding his letter, Alsaeed stated he would take legal action unless the college remedied the wrongs against him by extending him a permanent, full-time position as an instructor in history and government.

In a formal grievance filed on July 1, 1997, Alsaeed claimed he was better qualified than Thorpe and had been discriminated against on the basis of religion, gender, age, and national origin. On July 18, 1997, Alsaeed filed a formal complaint with the college's office of access and equity (EEO office), in which he claimed he had been discriminated against because of his age (51), religion (Muslim), sex (male), and national origin (Iraqi), and that the search to fill the

permanent position was "set up" to ensure Thorpe's hiring. By the end of July, Alsaeed had filed a complaint with the Equal Employment Opportunity Commission (EEOC). At some point in time, another unsuccessful applicant for the position also filed an EEOC complaint.

When Saenz notified Alsaeed that he had filed his grievance too late, he challenged that determination in a certified letter, dated August 4, 1997, in which he also formally accused Saenz of using "improper 'illegal' methods" to advance Thorpe's application. On the same day, Alsaeed sent a copy of his refused grievance to the college chancellor, along with copies of earlier correspondence.

On August 8, 1997, Patterson issued a memorandum to all faculty, department heads, and coordinators to "return to work" on August 18, 1997, and to attend in-service training the following day. A copy of the memorandum was apparently issued to Thorpe.[2] A budget report indicates an appropriation for a $3,380 per month salary to Thorpe, as a full-time instructor for Job No. 136011, for a 10.5-month period. Thorpe maintains the "report to work" notice was an "affirmative action" by the college, which, when coupled with the budget allocation, constituted a renewal of the contract she signed on March 5, 1997, under the terms of that contract.

After investigating Alsaeed's complaint, the college's EEO office issued a "fact-finding investigative report" on

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2. The memorandum was attached to Thorpe's response to the college's motion for summary judgment.

September 12, 1997, which the chancellor accepted on October 7, 1997, and the EEO office forwarded to Alsaeed the following day. The report refers to seven issues identified in Alsaeed's complaint. The sixth issue is a suggestion that Thorpe had misrepresented her teaching experience. The report does not identify the source of the suggestion, but indicates that the EEO compliance officer investigated it and found, based on information Thorpe provided, that it had "no validity." The compliance officer's final conclusion was that "[w]hile no evidence of discrimination was found in the investigation of this charge, evidence of errors in the screening committee and hiring process appear to warrant serious follow-up" by the chief operations officer.

Deposition testimony by the EEO compliance officer confirmed that the "errors" did not suggest discrimination, but management or administrative practices, specifically, "inconsistencies in screening," that resulted in two sets of rankings for the applicants, with the second ranking showing a much higher score for Thorpe and another applicant. Because the increased rankings apparently resulted from these applicants' being permitted to submit supplements to their applications directly to the screening committee, the officer was concerned whether other applicants had the same opportunity. The officer was also concerned that several members of the screening committee had apparently breached confidentiality by discussing the screening process.

Alsaeed disputed the report of the EEO inquiry in a September 15, 1997 letter to the chief operating officer. In rejecting the finding of mere procedural irregularities, Alsaeed cited the "American tradition" of "challenging

'immoral laws and acts,' " and referred repeatedly to a "calculated conspiracy" among Patterson, Saenz, and Thorpe to ensure the hiring of the "modestly qualified Ms. Thorpe."

On October 28, 1997, the chief operations officer of the college sent an e-mail to the human resources coordinator and others concerning the "undoing" of Thorpe's hiring decision. The e-mail contained the following message: "Please try to make this happen. The EEOC will have problems if we don't do this soon." In response to deposition questioning, the chief operations officer explained that the EEOC had discontinued its investigation because the college agreed to "reopen" Thorpe's position. The officer described the "reopening" as restarting the hiring process.

On November 3, 1997, the human resources coordinator of the college sent an e-mail message to the chief operations officer and others. This e-mail indicated that, because of "an EEO issue (Screening Committee selection problem)," the college was "re-posting" Thorpe's position, Job No. 136011, as Job No. 3630, and moving Thorpe into position Job No. 136037, "a position that is vacant at SE currently, on a Month to Month basis," so that the college could post Job No. 136011. The human resources coordinator's e-mail message also indicated that she would prepare a Recommendation for Employment, to be signed to place Thorpe in Job No. 136037, and requested input from the recipients for arrangements to move Thorpe out of position Job No. 136011.

The college posted an opening for a full-time faculty member position, under a nine-month contract, as "Position

ID E3073/136011/Replacement" with posting dates from November 4 to November 17, 1997.

On November 17, 1997, Thorpe received the following e-mail message from Patterson:

> Position number 3630 has been reopened because of irregularities found in the hiring process.
>
> Your status at [the college] at this time is month-to-month.
>
> You are an excellent instructor and have provided valuable service to the Southeast College. I hope you will consider reapplying for the position.

A copy of this message was sent to the college's chief operations officer and president. Thorpe maintains this notice was a breach of her contract.

Thorpe filed suit on November 20, 1997. She sued the college for breach of contract and in tort, and claimed that Alsaeed had defamed her and tortiously interfered with her contract. Thorpe sought temporary orders to restrain further defamatory statements by Alsaeed, but agreed to pass a December 3, 1997 hearing on this request in exchange for an agreement by the college to take no further action on her position.

On December 12, 1997, Patterson and Saenz recommended Thorpe for full-time employment for Position No. 136037. On March 5, 1998, the college's interim director of

compensation sent a memorandum to the college president, reciting that Thorpe's month-to-month status had been removed, retroactive to August 18, 1997. This memorandum referred to a letter agreement the college issued the same day for Position No. 136037, for a term of employment from August 18, 1997 through May 18, 1998.

Alsaeed removed this case to federal court in mid-December 1997. Following remand to the state trial court, the college's plea to the jurisdiction for Thorpe's tort claims was sustained. Thorpe has not appealed that ruling, and limits her appeal to challenging the "no evidence" summary judgments rendered for the college on her breach of contract claim and for Alsaeed on Thorpe's claims of defamation and tortious interference with her contractual relationship with the college.

Standard of Review

The college and Alsaeed moved for summary judgment on traditional and "no evidence" grounds. *See* TEX. R. CIV. P. 166a(a)-(c), (i).

When the party with the burden of proof seeks summary judgment under rule 166a(a) or (b), the party must prove it is entitled to judgment by establishing each element of its claim or defense as a matter of law, or by negating an element of a claim or defense of the opposing party as a matter of law. TEX. R. CIV. P. 166a (comment to 1997 change). Summary judgment is proper only when the movant establishes there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).

Appendix A

As the movants for summary judgment on "no evidence" grounds, the college and Alsaeed assumed the burden to state specifically the elements as to which Thorpe had no evidence. TEX. R. CIV. P. 166a(i). On meeting that showing, the burden shifted to Thorpe, as non-movant, to bring forth evidence that raised a fact issue on the challenged elements. *Id.* A no-evidence summary judgment is improperly granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact. TEX. R. CIV. P. 166a(i). There is less than a scintilla of evidence when the evidence is "so weak as to do no more than create a mere surmise or suspicion." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Conversely, there is more than a scintilla of evidence when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

In reviewing both traditional and "no evidence" motions, we assume all evidence favorable to the non-movant is true, and indulge every reasonable inference and resolve all doubts in favor of the non-movant. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 924 (Tex. App. — Houston [1st Dist.] 1993, no writ) (rule 166a(c) motion); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App. — Houston [1st Dist.] 1999, no pet.) (rule 166a(i) motion).

We consider all summary judgment grounds the trial court ruled on that the appealing party preserved for appellate review and are necessary for final disposition of the appeal.

Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996). We may affirm the summary judgment if a theory advanced in the motion for summary judgment is meritorious, even if the trial court did not rule on that ground. *Id.*

Summary Judgment for the College — Breach of Contract

Thorpe's first and second issues[3] challenge the summary judgment rendered for the college on her breach-of-contract claim. To prevail on this claim, Thorpe had to establish four elements: (1) the existence of a valid contract; (2) her performance under the contract; (3) breach of the contract by the college; and (4) damages. *See Hussong v. Schwan's Sales Enter., Inc.*, 896 S.W.2d 320, 326 (Tex. App. — Houston [1st Dist.] 1995, no writ).

Thorpe claims the college hired her on January 6, 1997 to teach history full-time, and breached that contract the following fall by changing her full-time status to month-to-month and reopening her position, without notice to her. The college disputed these claims by moving for summary judgment under rule 166a(i) on the grounds there was no evidence that it had breached its contract, nor any evidence that Thorpe had incurred damages.

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3. Thorpe's brief assigns different numbers to her issues when she lists them in her "statement of issues presented for review," and when she lists them in the table of contents and sequence of arguments in the text of her brief. We will follow the sequence as presented in the table of contents and brief.

Appendix A

The college relied on deposition excerpts to show that Thorpe premised her breach-of-contract claims on the "change" in her employment status from full-time to month-to-month. In contending that no breach occurred, the college conceded that a change to month-to-month status occurred "on paper," but argued that the "undoing" of her position was never carried out. The college offered documentary evidence, by the college's custodian of records for human services, showing that Thorpe had never been terminated, had no break in service, had been continuously employed at the college on a full-time basis from August 18, 1997 through May 17, 1998, and had no salary change in that period, except for an across-the-board raise approved for all employees. The college emphasized that Thorpe's contract allowed reassignment of Thorpe to other duties or positions, and that Thorpe was a probationary employee, and thus, subject to dismissal in her first year of full-time employment under the college's practice and procedures manual, but argued there had never been a dismissal because Thorpe had maintained the same course load and taught the same subjects since January 1, 1997, as she conceded in her deposition testimony.

In opposing the college's motion, Thorpe acknowledged she was continually employed, but insisted that a breach had occurred. Thorpe argued there were fact issues pertaining to the breach, as demonstrated by the e-mail message Patterson sent her on November 17, 1997 to report that her status had changed to month-to-month, and that the status change from a permanent, full-time employee to a temporary employee was a breach. Thorpe also relied on Patterson's and Saenz's recommendation that Thorpe be returned to full-time

employment. Thorpe protested the college's reliance on its retained, contractual rights to reassign her, change her duties, or dismiss her, as premised on a "ludicrous," unlimited right to terminate.

On appeal, Thorpe reemphasizes the November 17, 1997 internal e-mail message from Patterson. She also directs us to a November 3, 1997 internal e-mail message from the human resources coordinator to the chief operations officer, concerning "re-posting" of Job No. 136011, and switching Thorpe into Job No. 136037; the March 5, 1998 memorandum from the compensation director, reporting that Thorpe's month-to-month status had been removed "retroactive to August 18, 1997"; and another internal memorandum that references the compensation director's memorandum. Thorpe also emphasizes that the college never denied she had a full-time contract, and argues that a reasonable and fair minded jury could infer from the summary judgment evidence that the college breached her full-time contract by changing her status to month-to-month.

A court construes a contract as a matter of law to determine what it requires of the parties. *Meek v. Bishop, Peterson & Sharp, P.C.*, 919 S.W.2d 805, 808 (Tex. App. — Houston [14th Dist.] 1996, writ denied). When a dispute exists concerning the failure of a party to perform, the court submits that dispute to the trier of fact. *Id.* When performance is undisputed, there is no triable issue to submit to the jury. *Id.*

As noted, the college relies on Thorpe's probationary status, which made her subject to reassignment, change in

duties, or dismissal, at any time during the first year of her employment according to the college's practices and procedures. In the trial court, Thorpe claimed only that the college seemed to be asserting a "ludicrous" and "unlimited" right to terminate; she did not otherwise dispute her probationary status, nor dispute the college's retained right to reassign her to different positions or change her duties, or dismiss her during her probationary year. On appeal, Thorpe points out that the contract mandates that its terms control over the college's practice and procedures manual, and disputes her probationary status on the grounds that her contract was for a full, nine-month term. We disagree. The contract specifies that it is "terminable only in accordance with HCC's PPM (practice and procedures manual)." There is no conflict between the terms of the contract and the practice and procedures manual.

Based on the clear terms of the contract itself, which authorized reassignment of Thorpe during her probationary year, we conclude the college conclusively negated the "breach" element of Thorpe's breach-of-contract claim and therefore established its right to a "no evidence" summary judgment as a matter of law. Having reached this conclusion, we need not address the second portion of Thorpe's first issue, in which she claims fact issues exist on her claims for damages resulting from the breach. Because of this disposition, we also need not address the college's "cross-points" concerning Thorpe's summary judgment evidence.

We overrule Thorpe's first and second issues.

Appendix A

Summary Judgment for Alsaeed — Defamation

Part one of Thorpe's third issue challenges the summary judgment rendered in favor of Alsaeed on Thorpe's claim that he defamed her in statements to college officials and the EEOC. Thorpe based her defamation claim on Alsaeed's (1) oral and written statements, to EEOC and school officials, that Thorpe had been chosen for the position because of her personal relationships with those responsible for hiring; and (2) oral statements to school officials that Thorpe had lied about her teaching experience at Texas A & M University-Galveston to win the position.[4] In her fourth issue, Thorpe challenges Alsaeed's claim that his statements were qualifiedly privileged. We address the fourth issue first because it involves an affirmative defense, which, if conclusively proven, would entitle Alsaeed to summary judgment on Thorpe's defamation claim.

A. Summary Judgment on Defense of Qualified Privilege[5]

A qualified or conditional privilege attaches to statements made in good faith on any subject matter in which the author of the statement has an interest, or with reference to which he has a duty to another person, who has a corresponding interest or duty. *See Randall's Food Mkts.,*

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4. As addressed above, the college's EEO officer investigated Alsaeed's grievance and concluded Thorpe had not misrepresented her teaching experience.

5. Alsaeed and Thorpe mistakenly refer to the doctrine as qualified "immunity."

Inc., 891 S.W.2d at 646; *Grant v. Stop-n-Go Mkt.*, 994 S.W.2d 867, 874 (Tex. App. — Houston [1st Dist.] 1999, no pet.). The court determines, as a matter of law, whether a privilege exists. *Calhoun v. Chase Manhattan Bank (U.S.A.) N.A.*, 911 S.W.2d 403, 408 (Tex. App. — Houston [1st Dist.] 1995, no writ).

The privilege is qualified, rather than absolute, because the person invoking it must have acted lawfully and for a proper purpose. *Holloway v. Texas Medical Ass'n*, 757 S.W.2d 810, 813 (Tex. App. — Houston [1st Dist.] 1988, writ denied); *Parker v. Holbrook*, 647 S.W.2d 692, 697 (Tex. App. — Houston [1st Dist] 1982, writ ref'd n.r.e.). The privilege remains intact as long as communications pass only to those who have an interest or duty in the matter to which the communications relate. *See Randall's Food Mkts., Inc.*, 891 S.W.2d at 646; *Grant*, 994 S.W.2d at 874. Unlawful communications, and those that pass beyond those with an interest or duty in the subject matter, are not privileged. *Randall's Food Mkts., Inc.*, 891 S.W.2d at 646; *Grant*, 994 S.W.2d at 874. Proof that a statement was motivated by actual malice, existing at the time of publication, also defeats the privilege. *Randall's Food Mkts., Inc.*, 891 S.W.2d at 646; *Grant*, 994 S.W.2d at 874. In the defamation context, a statement is made with actual malice when it is made with knowledge that it is false, or with reckless disregard to whether it is false. *Randall's Food Mkts., Inc.*, 891 S.W.2d at 646; *Grant*, 994 S.W.2d at 874.

Because the privilege is an affirmative defense, *Holloway*, 757 S.W.2d at 813, by invoking it in moving for traditional summary judgment under rule 166a(c), Alsaeed

assumed the burden not only to establish conclusively that his communications were lawful and made only to those with an interest or duty in the subject matter, but also to conclusively negate actual malice. *See Randall's Food Mkts, Inc.*, 891 S.W.2d at 646; *Parker*, 647 S.W.2d at 698.

Alsaeed supported his motion for summary judgment with his own affidavit and copious documentary evidence, which included his entire file of protest correspondence to college officials. In his affidavit, Alsaeed averred his sincere belief that he was more qualified than Thorpe for the position she won, and proceeded in good faith and without malice to pursue the remedies available to him with the college agencies and the EEOC. He denied any written or verbal statement regarding Thorpe that he either knew was false or made with reckless disregard of whether it was false. Alsaeed conceded his "belief" that Thorpe was chosen partly because of "her relationship" with Patterson and Saenz, but denied any derogatory or defamatory remarks suggesting she "slept around" or had an "illicit or sexual relationship" with Patterson that prompted her hiring. Alsaeed specifically denied any statement that Thorpe had falsified her teaching experience, claiming the issue was raised as a mere possibility in a letter, sent not from him, but from his union representative, to the college's EEO officer, but conceded he might have told a colleague that an issue had arisen about whether Thorpe had misrepresented her qualifications.

In opposing summary judgment on her defamation claim, Thorpe relied on her own affidavit, which established the teaching experience that Alsaeed disputed, and the body of Alsaeed's correspondence to the college. As set forth above,

there is at least a genuine issue of fact about whether this correspondence ultimately exceeded the bounds of a good-faith challenge to Thorpe's qualifications and good-faith accusations that Patterson and Saenz used their influence to gain the position for Thorpe. From these preliminary allegations, Alsaeed progressed to written statements that he was acting to correct "immoral" acts, and that Thorpe "conspired" with Patterson and Saenz to get the job by "illegal" means and methods. While the recipients of the statements had an interest in the statements, there is at least a fact issue about whether Alsaeed's accusations sufficiently exceeded lawful purpose to prevent Alsaeed from conclusively negating actual malice.

Concerning whether Alsaeed slandered Thorpe by stating that she lied about her teaching experience, Alsaeed's own summary-judgment evidence does not conclusively negate actual malice. Alsaeed relied on excerpts from deposition testimony by the college's chief operations officer concerning the source of allegations that Thorpe lied about her teaching experience. In these excerpts, which refer to a meeting among the chief operations officer, Alsaeed, and the EEO officer, the chief operations officer declined to agree that Alsaeed's union representative raised the issue, claiming she could not remember who had raised it verbally. The chief operations officer confirmed this testimony in additional portions of the same deposition. In excerpts from an earlier deposition, however, the officer stated that Alsaeed had "shared with her" that Thorpe had misstated her teaching experience. While this statement might arguably have been privileged by common interest in the context identified in the later deposition, a meeting with the chief operations

officer and the college's EEO officer, the earlier deposition excerpt refers only to a statement Alsaeed made to the chief operations officer without identifying a common interest context. Moreover, Alsaeed conceded he might have passed on to a colleague that an issue had been raised as to Thorpe's honesty.

We conclude that Alsaeed did not meet his burden under rule 166a(c) to conclusively establish his affirmative defense of qualified privilege. Because the summary judgment evidence shows written statements by Alsaeed that attributed conspiracy, immorality, and illegality to Thorpe, and oral statements by Alsaeed to the college's chief operations officer that attributed fraudulent misrepresentation to Thorpe, Alsaeed fell short of conclusively establishing a lawful purpose for communications to persons of a common interest, and did not conclusively negate malicious intent. Accordingly, Alsaeed was not entitled to prevail by summary judgment in asserting his statements were qualifiedly privileged, and summary judgment was improperly rendered in his favor on that ground.

We sustain Thorpe's fourth issue.

B. Summary Judgment on Merits of Defamation Claim

To maintain a defamation action, the plaintiff must establish that the defendant (1) published a statement; (2) that was defamatory of the plaintiff; (3) while acting with actual malice, if the plaintiff was a public figure, or, if the plaintiff was a private individual, with negligence regarding the truth of the statement. *WFAA — TV, Inc. v. McLemore*,

978 S.W.2d 568, 571 (Tex. 1998); *Evans v. Dolcefino*, 986 S.W.2d 69, 76 (Tex. App. — Houston [1st Dist.] 1999, no pet.). Thorpe is not a public figure. Accordingly, merely negligent publication would suffice. To prevail by summary judgment, Alsaeed must have disproved at least one essential element of Thorpe's defamation claim. *WFAA — TV, Inc.*, 978 S.W.2d at 571.

Defamatory statements are of two types: written or graphic statements, which constitute libel, and oral statements, which constitute slander. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997) (defining libel); *Randall's Food Mkts, Inc.*, 891 S.W.2d at 646 (defining slander). Thorpe alleged both libel and slander.

From the same summary-judgment evidence that we relied on to conclude that Alsaeed did not conclusively establish his qualified privilege, specifically, Alsaeed's written statements that attributed conspiracy, immorality, and illegality to Thorpe, and his oral statements to the college's chief operations officer that attributed fraudulent misrepresentation to Thorpe, we conclude that Alsaeed did not meet his burden under rule 166a(c) to conclusively negate Thorpe's defamation claim. Because Thorpe is a non-public figure, for whom the governing standard is negligence and not malice, Alsaeed's written statements suffice to raise a fact issue concerning whether he defamed Thorpe. Fact issues likewise remain with respect to whether Alsaeed defamed Thorpe by accusing her of misrepresenting her qualifications.

We sustain the first portion of Thorpe's third issue in which she disputes Alsaeed's right to prevail by summary judgment on her defamation claim.

Appendix A

Summary Judgment for Alsaeed — Tortious Interference with Contract

Part two of Thorpe's third issue challenges the summary judgment rendered in Alsaeed's favor on her claim that he tortiously interfered with her employment contract. In response to Thorpe's claim, Alsaeed relied on the affirmative defense that his actions were justified because he was pursuing his legal rights.

Tortious interference with a contract consists of four elements: (1) the existence of a contract subject to interference; (2) the occurrence of an act of interference that was willful and intentional; (3) the act was a proximate cause damage to the plaintiff; and (4) actual damage or loss to the plaintiff occurred. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998); *Lane Bank Equip. Co. v. Smith South. Equip., Inc.*, 981 S.W.2d 302, 304 (Tex. App. — Houston [1st Dist.] 1998), *aff'd on other grounds*, 10 S.W.3d 308 (Tex. 2000). A defendant may prevail against a claim of tortious interference by negating these elements or by conclusively establishing the affirmative defense of justification. *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

Interfering with the contract of another is justified, or qualifiedly privileged, if the interfering party (1) exercises his own legal rights, which must be either equal to or superior to his opponent's; or (2) acts, in good faith, to further a colorable legal right, even though the claim proves ultimately to be mistaken. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996); *Bennett v. Computer Assoc., Intern.*,

Inc., 932 S.W.2d 197, 202 (Tex. App. — Amarillo 1996, writ denied). Because justification is an affirmative defense, the defendant who asserts it presents an independent reason why the plaintiff may not recover. *See Texas Beef Cattle Co.*, 921 S.W.2d at 212. Accordingly, even if the plaintiff conclusively establishes that the defendant tortiously interfered with the contract, the defendant may escape liability by conclusively establishing that the interference was justified. *See id.* at 211. In moving for summary judgment based on the affirmative defense of justification, Alsaeed assumed the burden to prove it conclusively. *See Friendswood Dev. Co.*, 926 S.W.2d at 282.

Alsaeed contends that in writing letters, filing an EEO grievance, and filing an EEOC charge, he was merely pursing his "legal rights." The law of tortious interference distinguishes justification that may arise in exercising a "legal right" to interfere with a contract from justification that may arise when exercising a "colorable" right to interfere. "Legal" rights to interfere generally derive from an existing economic interest, typically a contract. *See e.g.*, *Friendswood Dev. Co.*, 926 S.W.2d at 282 (holding that exclusive agency agreement conclusively supported justification defense); *Rodriguez v. NBC Bank*, 5 S.W.3d 756, 766 (Tex. App. — San Antonio 1999, no pet.) (holding that depository agreement conclusively established justification defense); *Abraham v. Ryland Mortgage Co.*, 995 S.W.2d 890, 895 (Tex. App. — El Paso 1999, no pet.) (holding that deed of trust conclusively supported justification defense). The defendant's state of mind or motive is irrelevant if he conclusively proves justification by establishing that he had a legal right to interfere with the contract. *Texas Beef Cattle*, 921 S.W.2d at 211.

Alsaeed does not premise his arguments on an existing legal right, but on the "colorable" rights he was attempting to assert by writing letters and through his EEO grievance and EEOC charge. *See Bennett*, 932 S.W.2d at 202 (defining "colorable" right as an appearance of right that would lead others to suppose the existence of the right claimed). A defendant who cannot establish a legal right as a matter of law may nevertheless prevail on the affirmative defense of justification, provided (1) the trial court determines that the defendant interfered while exercising a colorable right; and (2) the jury finds that, although mistaken, the defendant exercised the legal right in good faith. *Texas Beef Cattle*, 921 S.W.2d at 211; *Bennett*, 932 S.W.2d at 202.

We note again Alsaeed's written statements that attributed conspiracy, immorality, and illegality to Thorpe, and his oral statements to the college's chief operations officer that attributed fraudulent misrepresentation to Thorpe. These instances constitute some evidence that Alsaeed's letters, EEO grievance, and EEO charge went beyond merely asserting colorable rights in good faith. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 691 (Tex. 1989). Accordingly, Alsaeed did not conclusively establish that his actions were justified and was not entitled to prevail by summary judgment on that claim.

We sustain part two of Thorpe's fourth issue.

Conclusion

We affirm the summary judgment in favor of the college on Thorpe's breach-of-contract claim. We reverse the

summary judgment for Alsaeed on Thorpe's claims for defamation and tortious interference with her contractual relationship with the college, which portion of the judgment we remand to the trial court for further proceedings.

Tim Taft
Justice

Panel consists of Justices Mirabal, Taft, and Price.[6]

Do not publish. TEX. R. APP. P. 47.4.

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6. The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

Appendix A

COURT OF APPEALS
FIRST DISTRICT OF TEXAS

NO. 01-99-00549-CV

MICHELLE THORPE,

Appellant

V.

IBRAHIM ALSAEED AND HOUSTON COMMUNITY COLLEGE SYSTEM,

Appellees

Appeal from the 190th District Court of Harris County, Texas. (Tr. Ct. No. 97-57251). Panel consists of Justices Mirabal, Taft, and Price. Opinion delivered by Justice Taft.

JUDGMENT

This cause heard today by the Court is an appeal from the judgment signed by the court below on March 25,1999, in favor of appellee, HOUSTON COMMUNITY COLLEGE SYSTEM, which rendered final the summary judgment, also signed by the court below on March 25, 1999, in favor of appellee, IBRAHIM ALSAEED. After submitting the cause and inspecting the record of the court below, it is the opinion of this Court that there was reversible error in the final judgment that rendered summary judgment in favor of appellee, IBRAHIM ALSAEED, on the claims of appellant,

MICHELLE THORPE, appellant, for defamation and tortious interference with her contractual relationship with the appellee, HOUSTON COMMUNITY COLLEGE SYSTEM. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that that portion of the final judgment of the court below be **reversed** and the cause **remanded**.

It is further the opinion of this Court that there was no reversible error in the portion of the judgment that rendered summary judgment in favor of appellee, HOUSTON COMMUNITY COLLEGE SYSTEM, on the claims of appellant, MICHELLE THORPE, for breach of contract. It is, therefore, **CONSIDERED, ADJUDGED,** and **ORDERED** that that portion of the judgment be **affirmed**.

It is further **ORDERED** that appellant, MICHELLE THORPE, pay one-third of all costs incurred by reason of this appeal, and that appellee, IBRAHIM ALSAEED, pay two-thirds of all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Mirabal, Taft, and Price.

Judgment rendered May 11, 2000

APPENDIX B — ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 190TH JUDICIAL DISTRICT DATED AND FILED MARCH 25, 1999

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
190th JUDICIAL DISTRICT

NO. 97-57251

MICHELLE THORPE

VS.

IBRAHIM ALSAEED and the HOUSTON COMMUNITY COLLEGE SYSTEM

ORDER

Be it remembered that on this day came on to be heard Defendant Ibrahim Alsaeed's Motion for Summary Judgment and the Court, having considered same, finds that said Motion does have merit and should be **GRANTED.** It is therefore,

ORDERED, ADJUDGED AND DECREED that Defendant Ibrahim Alsaaed's Motion for Summary Judgment is hereby **GRANTED.**

SIGNED this 25th day of March, 1999.

s/ [illegible]
JUDGE PRESIDING

APPENDIX C — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED AUGUST 10, 2000

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 10, 2000

Mr. Yuri Alexis Calderon
Bracewell & Patterson
711 Louisiana, Suite 2900
Houston, TX 77002

Mr. Truman Dean, Jr.
Texas State Teachers Association
316 W. 12th Street
Austin, TX 78701

Mr. Ronald James Bounds
316 West 12th Street
Austin, TX 78701

Mr. Scott Richard Pitts
Novelli & Harvie
12605 North Featherwood
Houston, TX 77034

RE: Case Number 00-0645
Court of Appeals Number: 01-99-00549-CV
Trial Court Number: 9757251

Style: IBRAHIM ALSAEED
v.
MICHELLE THORPE

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Appendix C

Sincerely,

John T. Adams, Clerk

by s/ Julio C. Alvarado
Julio C. Alvarado, Deputy

cc: Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TITLE VII

§ 2000E-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(2)

No. 00-747

FILED
DEC 11 2000
CLERK

IN THE

Supreme Court of the United States

IBRAHIM ALSAEED,

Petitioner,

v.

MICHELLE THORPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the First District of Texas correctly applied the procedural laws of the State of Texas as they relate to the burden of proof in a summary judgment proceeding, when the Petitioner claims to have exercised his right to petition under the First Amendment.

Michelle Thorpe respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Ibrahim Alsaeed. Because this is not an appeal of a final judgment of the highest court of Texas, this Court does not have jurisdiction to hear this case. Further, this is an appeal of Texas procedural law as applied to a Texas Summary Judgment Proceeding; therefore, no federal question is presented.

COUNTERSTATEMENT OF THE CASE

Respondent objects to Petitioner's Statement of the Case in that Petitioner attempts to argue his case instead of presenting a concise statement of the case setting out the facts material to consideration of the question presented. Pet. at 1-4. Respondent believes the Court of Appeals for the First District of Texas set out the facts material to this appeal; accordingly, respondent adopts pages 2a-9a of Petitioner's Appendix A as her counterstatement of the case. Pet., App. A 2a-9a.

Petitioner's Statement of Facts and Procedural History fail to acknowledge there is an active claim for toritious interference with an employment contract as well as a claim for defamation; therefore, Respondent objects to Petitioner's Statement of Facts and Procedural History. Pet. at 1-2.

REASONS FOR DENYING THE WRIT

1. Because the Court of Appeals for the First District of Texas remanded this case for further proceedings, its decision is not final.

Under 28 U.S.C. § 1257, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a); *O'Dell v.*

Espinoza, 456 U.S. 430, 102 S. Ct. 1865, 72 L. Ed. 2d 237 (1982). A judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S. Ct. 770, 773, 89 L. Ed. 1171 (1945). It must be the final word of the court. *Id.* This finality rule is firm, not a technicality to be easily scorned. *Radio WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L. Ed. 2092 (1945). Because the Court of Appeals for the First District of Texas remanded this case for trial, its decision is not final as an effective determination of the litigation.

Although there is a limited set of situations in which this Court has found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 328 (1975), this case does not fit into any of those categories. This is not a case where the federal question finally decided by the highest court of the state will survive and require decisions regardless of the outcome of future state court proceedings. *Id.* Resolution of the state-law claims could effectively moot the federal-law question raised by petitioner. Most notably, if, at trial, Respondent cannot show that Petitioner acted with malice, then Respondent's defamation claim would necessarily fail.

This is not an instance where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Id.* If the Court of Appeals' decision ultimately makes a difference, the Petitioner will be able to seek review once the state court litigation comes to an end.

This appeal fits within no exceptional category; therefore, this court lacks jurisdiction to review the Court of Appeals' decision on Petitioner's claim of qualified immunity. Further, the Court of Appeals also remanded Respondent's cause of action for tortious interference with a contract; therefore, the Court of Appeals' decision on qualified immunity is not final to all issues. Accordingly, Petitioner's Petition should be denied for want of jurisdiction.

2. Petitioner is attempting to challenge a Texas procedural law; therefore, no federal question is presented.

The Texas Rules of Civil Procedure govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature. Tex. R. Civ. P. 2. The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature. Fed. R. Civ. P. 1. The case at bar is in the 190th Judicial District Court of Harris County, Texas. Therefore, the Texas rules of civil procedure govern this case.

Petitioner seems to be claiming this Court placed the burden on Respondent to show absence of malice in a summary judgment. Pet. at 6. In *Anderson v. Liberty Lobby Inc.*, this Court placed the burden on the party responding to summary judgment, in a defamation case in federal court, to show malice. 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). However, *Liberty Lobby* was based not on constitutional requirements, but merely on federal procedure. This Court was not granting "special procedural protections to defendants" because of the type of case involved, but merely applying general federal summary judgment rules to the particular circumstances of the particular circumstances of a public figure defamation case. 477 U.S. at 256 n.7, 106 S. Ct. at 2514 n.7, 91 L. Ed. 2d at 216 n.7 (1986). As Justice Brennan observed in his dissent:

> The Court's holding today is not, of course, confined in its application to First Amendment cases . . . It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.

477 U.S. at 257-58 n.1, 106 S. Ct. at 2515 n.1, 91 L. Ed. 2d at 217-18 n.1 (Brennan, J., dissenting).

Summary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. *See Casso v. Brand*, 776 S.W. 2d 551, 556 (Tex. 1989). In Texas, summary judgments are used to merely eliminate patently unmeritorious claims and untenable defenses. *City of Houston v. Clear Creek Basin Authority*, 589 S.W. 2d 671, 678 n.5 (Tex. 1979). Texas procedure never shifts the burden of proof to the non movant unless and until the movant has established his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. *Id.* at 678. Nothing in this Court's decision, in *Liberty Lobby*, compels a Texas court to abandon its established summary judgments procedure either generally or in a particular case. *Casso*, 776 S.W. 2d at 556.

The Court of Appeals for the First District of Texas acted properly in applying Texas summary judgment standards to a case pending in a Texas District Court. No federal question is presented by Petitioner's Petition, only one of Texas procedural law. Therefore, this Court should deny Petitioner's Petition for want of Jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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